

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

DETROIT TARPAULIN AND REPAIR SHOP,  
INC.,

Plaintiff, CIVIL CASE NO. 05-40325

v.

TRI-STATE TARP, INC. and BRENT  
NITSCHKE,

HONORABLE PAUL V. GADOLA  
U.S. DISTRICT COURT

Defendants.  
\_\_\_\_\_

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

This contract action was removed to this Court by Defendants on October 24, 2005, on the basis of diversity jurisdiction. *See* 28 U.S.C. § 1332(a)(1). The complaint names Tri-State Tarp, Inc. ("Tri-State") and its principal owner, Brent Nitsche ("Nitsche"), as defendants. Before the Court, again, is Defendant Nitsche's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c), first filed on December 9, 2005. After initially granting Defendant Nitsche's motion on February 8, 2006, this Court then set aside that order on April 13, 2006, after Plaintiff indicated that Defendant's motion to dismiss was electronically filed only and, at the time, Plaintiff was not registered to use the Court's electronic filing system. Plaintiff therefore, did not wilfully abstain from filing a response to the motion to dismiss but instead, was unaware that a motion requiring a response was pending. In the interests of justice, the Court set aside the order granting Defendant Nitsche's motion to dismiss and ordered Plaintiff to file a response to Defendant's

motion. Now, after Plaintiff has received proper notice of the motion and filed a timely response, this Court again considers Defendant's motion to dismiss.

A Court considering a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) or 12(c) must "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." *E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001); *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998). The Federal Rules of Civil Procedure "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). In determining whether Plaintiff has stated a claim, the Court will examine the complaint and any written instruments that are attached as exhibits to the pleading. Fed. R. Civ. P. 12(b)(6), 10(c).

After further consideration, having reviewed Defendant's motion, the pleadings, and the applicable law, the Court determines that Defendant's motion to dismiss will be denied. Specifically, considering whether Plaintiff's complaint with respect to Defendant Nitsche gives fair notice of what Plaintiff's claim is and the grounds upon which it rests, *Conley*, 355 U.S. at 47, and presuming Plaintiff's factual allegation that Defendant Nitsche acted in an individual capacity in incurring debt owed to Plaintiff as true, *E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d at 851, the Court is unable to conclude that Plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 47.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Defendant Nitsche's motion to dismiss [docket entry 13] is **DENIED**.

**SO ORDERED.**

Dated: July 27, 2006

s/Paul V. Gadola  
HONORABLE PAUL V. GADOLA  
UNITED STATES DISTRICT JUDGE

Certificate of Service

I hereby certify that on July 27, 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Eric A. Buikema; Thomas G. Cardelli; Craig J. Pollard, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: \_\_\_\_\_.

s/Ruth A. Brissaud  
Ruth A. Brissaud, Case Manager  
(810) 341-7845